APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 111-55

BINGLER VACATION TOURS, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA ET AL., *Defendants*.

Findings of Fact and Conclusions of Law

Findings of Fact

1. Plaintiff, Bingler Vacation Tours, Inc., hereinafter referred to as Bingler, is a corporation, and is a common carrier of passengers by motor vehicle in interstate commerce.

2. Bingler holds a certificate of public convenience and necessity issued by the Interstate Commerce Commission which, among other things, authorizes Bingler to operate as a motor common carrier in the transportation of passengers over irregular routes, in special operations, in round-trip sightseeing or pleasure tours, from New York City and points in three nearby New Jersey counties to points in New Jersey and 13 other eastern states and the District of Columbia.

3. By complaints filed with the Commission in 1949, two of Bingler's competitors, Asbury Park-New York Transit Corporation and Quaker City Bus Company, alleged that Bingler was engaged in the transportation of passengers by motor vehicle in interstate commerce over regular routes (a) between New York City and Asbury Park, N. J., (b) between New York City and the Monmouth Park race track at Oceanport, N. J., and (c) between New York City and the Garden State Race Track, near Camden N. J.; that Bingler was without authority to enage in such interstate operations; and that the complainants, respectively,

were authorized, under certificates of public convenience and necessity issued by the Commission, to engage in such operations, and were engaged therein. The complainants asked for investigation by the Commission of the alleged violations by Bingler, and for orders requiring Bingler to cease and desist therefrom.

4. The two complaints were heard jointly before a hearing examiner of the Commission. Evidence was offered by the complainants, by Bingler, and by numerous intervenors. Subsequent proceedings included the examiner's recommended report, exceptions thereto, a report by Division 5 of the Commission, petitions for reconsideration, oral argument before the entire Commission, post-argument briefs, and the Commission's final report, the latter being dated October 4, 1954, being reported at 62 M.C.C. 731, and being accompanied by a cease-and-desist order directed against Bingler. Bingler thereafter filed a petition for reconsideration and for reopening of the proceeding. The Commission denied this petition by order dated January 17, 1955.

5. In its final report the Commission made the following evidentiary or subsidiary findings, among others:

> (a) Since January 5, 1947, Bingler has published tariffs which provide round-trip fares for "round-trip, sightseeing or pleasure tours" from points in the origin territory to those in the States named in its certificate. A section of the tariff entitled "Sightseeing Tours" includes fares on round trips to the points here in question, among many other specific points, indicating that they are of one day's duration. Round-trip tickets were sold by Bingler for transportation from New York City to the Monmouth Park track and Asbury Park, and return, during 1948 and 1949, and from New York City to the Garden State track and return during 1949. Transportation to the tracks was provided during racing meets which were held during the period specified in the complaints, and during the summer season to Asbury Park.

Bingler's tickets are sold at a bus terminal in New York City which facilities are used by many regular-route passenger carriers. Tickets issued in 1948 by Bingler bear its name and are in 2 sections; 1 part is valid for the outbound transportation from New York City to either the Monmouth Park track, Garden State track, or Asbury Park, and the second portion for the return trip. They are marked "1 day excursion," and "good only on special excursion motor coaches." In 1949, a more elaborate ticket was used to the Monmouth Park track and Asbury Park. It is marked "sightseeing and pleasure trip." The return portion of the ticket notifies patrons that buses return to the New York City terminal, the point of departure. The Monmouth Park track ticket bears the additional information that the last bus leaves the park 15 minutes after the final race. In no instance does the price of the ticket include any service other than transportation, nor is any guide or conductor provided.

(b) Various forms of advertising are employed by Bingler to inform the public of its track and Asbury Park service. Handbills or throwaway advertisements declare "special direct buses" for Monmouth Park racetrack leave the New York City terminal at a certain time daily, Monday through Saturday, returning after the last race. A brochure distributed in 1949 detailing data about the Monmouth track advertises Bingler's operation as "frequent bus service starting at 11:15 and to 12:00 noon." Newspaper advertisements apprise the public that Bingler offers direct bus service to Monmouth Park racetrack, "daily 11:15 a.m. to noon." Practically identical handbills advertise Bingler's service to the Garden State racetrack; newspaper inserts inform the public that service from the terminal is daily at 10:30 a.m. and that Bingler provides "the only non-stop express buses from N.Y.C." Throwaway handbills advertise Bingler's Asbury Park operation, also, informing the public that the service is a "special bus trip," that the ride is scenic, over roads not used by public transportation facilities, and that a 6-hour stop is made at Asbury Park. Buses leave the New York City terminal daily, except Sundays and holidays, at 10 a.m., and leave Asbury Park about 6:30 p.m. The handbills declare that Bingler

reserves the right to cancel trips when necess
Newspaper advertisements bear the name of the
minal company whose facilities are used by Bin
and which acts as an agent of Bingler and ot
motor carriers in the sale of tickets. They advise
there is a daily, except Sunday, operation to Asb
Park leaving New York City at a certain time. Ot
operations offered by Bingler are a part of the s
advertisement including 1 to Lake Hopatcong, N.
on Saturdays only, 1 to Graymoor, a religious sh
near Garrison, N. Y., operated on Sundays only,
a "Mystery Frolic" on Saturdays. Departure ti
are advertised on these other operations also.

(c) From June 21 through August 7, 1948, Bin
operated 325 round trips to Monmouth Park r
track, with as many as 30 trips in a single day. It
erated 42 days during this period, thus averaging
trips a day. From June 17 to August 10, 1949, a t
of 285 round trips were made to the same track,
erating 47 days, an average of 6 trips daily. F
May 3 through May 30, and from October 3 thro
November 1, 1949, Bingler operated 72 round trip
Garden State racetrack on 50 separate days, or ab
1.4 trips daily. The maximum number of trips
erated in any single day to and from this tr
was four. From August 5 to September 26, 1
Bingler operated 36 days making 55 round trips
Asbury Park, or an average of 1.8 trips a day; dur
1949, it operated 1 day in April, 20 in July, 20
August, and 6 in September to Asbury Park. Dur
a 5-month period in 1948, Bingler derived about $
000 or about 40 percent of its gross revenue from
Monmouth track operation.

6. Based upon the foregoing subsidiary findings,
after considering the opinions of witnesses introduced
experts on the subject of what constitutes "tour servic
and after considering numerous dictionary definitions
the words "tour" and "excursion," the Commission fo
and concluded:

(a) That "round-trip sightseeing or pleasure to
in special operations, which involve radial or te

torial authority, must include something substantial in addition to, or different from, bare expeditious transportation between two points, which factor is the fundamental characteristic of ordinary regular-route passenger-carrier service;"

(b) That: "If regularity, frequency, and expeditious service are introduced as additional factors in such point-to-point operation, then progressively it becomes even more important that these characteristics of an ordinary passenger operation not predominate in the service which is offered and provided to its patrons;"

(c) That: "Otherwise, a carrier holding such authority, without any fixed responsibility to the public, could concentrate at will on practically any points of its choosing within its authorized territory in direct and destructive competition with the ordinary regular-route carrier upon which the public must depend for its day-to-day basic transportation, in violation of the purport of its certificate and contrary to the public interest and the national transportation policy;"

(d) That "neither the racetrack operations nor the Asbury Park operations [conducted by Bingler] are anything more than bare expeditious round-trip passenger transportation between specified points, and [both] are beyond the scope of [Bingler's] authority which is restricted to round-trip sightseeing or pleasure tours"; and

(e) That an order should be entered directing Bingler to cease and desist from the performance of any transportation of the character found in the report to be beyond the scope of its authority.

7. The Commission thereupon entered such a cease-and-desist order directed against Bingler, and subsequently denied Bingler's petition for reconsideration and rehearing. Those are the two orders which Bingler assails in the suit at bar and which it prays the court to annul and set aside.

Conclusions of Law

1. The court has jurisdiction over this cause of action and the parties hereto.

2. The proceedings here sought to be reviewed were within the scope of the Interstate Commerce Commission's statutory authority.

3. The findings of fact made by the Interstate Commerce Commission are supported by substantial evidence in the whole record.

4. The Commission made clear and adequate findings upon the pivotal facts, and the theory upon which it decided the case is clearly set forth in its report, thereby affording a rational basis for its ultimate finding and conclusion that Bingler's operations between New York City and Asbury Park and between New York City and the two New Jersey racetracks are not within the scope of Bingler's operating authority and therefore are unlawful, and that Bingler should cease and desist therefrom.

5. The conduct of bare expeditious transportation operations between two specified points within its broad territory by the holder of a radial, territorial, "tour" certificate such as that of Bingler would contravene:

(a) the provisions of Sections 206 and 207(a) of the act.

(b) the duty of the Commission, under Section 208(a) to specify in the certificate the service to be rendered and the termini between which, if any, operations are authorized.

6. The cease-and-desist order is not void for vagueness or indefiniteness because of its direction that Bingler abstain from the performance of any transportation of the character found in the Commission's final report to be beyond the scope of Bingler's authority under its certificate. The Commission has gone to considerable lengths in advising Bingler of the factors relevant to a determination of its

rights under its certificate. It has done so both in terms of the criteria of ordinary regular-route service, which Bingler must avoid, and in terms of the service which Bingler is authorized to carry on.

7. Denial of Bingler's petition for reconsideration and for reopening of the proceeding was a matter within the Commission's sound discretion, and no abuse of that discretion appears. Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514; United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535.

8. The Commission's orders are not unlawful, as alleged by the plaintiff (Bingler), and its complaint should be dismissed.

By the Court,

/s/ JOHN BIGGS, JR.
United States Circuit Judge.

June 9th, 1955.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 111-55

BINGLER VACATION TOURS, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Before BIGGS, *Circuit Judge*, and MODARELLI and HARTSHORNE, *District Judges*.

Opinion

By BIGGS, *Circuit Judge*.

The plaintiff, Bingler Vacation Tours, Inc., is a New Jersey corporation and holds Certificate of Public Convenience and Necessity No. MC 599 issued by the Interstate Commerce Commission on March 3, 1948. The certificate authorizes Bingler to engage in transportation in interstate and foreign commerce as a common carrier by motor vehicle subject to the following specifications: "Irregular Routes: Passengers and their baggage, in special operation restricted to traffic originating at the points indicated in round-trip sightseeing or pleasure tours, from points and places in Passaic, Bergen and Essex Counties, N.J., and New York, N.Y., to points and places in Connecticut, Delaware, Maine, Maryland, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Penn-

sylvania, Rhode Island, Tennessee, Vermont, Virginia, and the District of Columbia, and return. Restriction: The service authorized above is subject to the following conditions: No passenger shall be picked up at any point not within the above-described base territory who has not purchased a round-trip tour ticket. Except in the case of a bona fide stop-over from one tour to a succeeding tour, no passenger shall be discharged at any point outside the described base territory other than the point of origin of that particular passenger." Section 207(a) of the Interstate Commerce Act, 49 USCA § 307(a), authorizing the issuance of the necessary certificate to engage in interstate transportation whenever the present or future public convenience and necessity so requires, contemplates the type of certificate issued to Bingler by providing "That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Among the operations conducted by Bingler under this certificate were bus services between New York City and three locations in New Jersey. Bingler offered one of these services between New York City and the horse racing track of the Monmouth Park Jockey Club, Oceanport, New Jersey, during the racing season of 1948 and 1949. A similar service was offered between New York City and the Garden State Race Track during the season of 1949. Bingler published tariffs which listed these operations as "Sightseeing Tours" and advertised the services as "Special Direct Buses." The tickets for the trips which were sold at the New York bus terminal whose facilities were used by Bingler were marked "1 day excursion," "good only on special execursion motor coaches," and "sightseeing and pleasure trip." The price of the tickets included only the tranportation service. Bingler buses left the New York City terminal in time to reach the tracks before the

first race. Direct routes were used; no guides were employed and only short rest stops were made. The passengers were discharged at the entrance to the tracks and shortly after the last race the buses returned in the same manner to New York City.

Bingler also operated a bus service between New York City and Asbury Park, New Jersey, a beach resort, during the summer months of 1948 and 1949. The service was substantially similar to that operated to the race tracks except that in going to Asbury Park an indirect route along the sea coast was used. The trip was advertised as a "scenic tour of the North Jersey coast that provides the tourist with long-remembered vistas of a seascape and landscape, along with a five hour stop at Asbury Park." On arrival at Asbury Park, passengers were discharged at a point along the beach, left to their own pursuits, and then returned directly to New York City in the evening.

In 1949, Asbury Park-New York Transit Corporation, a common carrier authorized to operate regular service between New York City and Asbury Park and the Monmouth track, filed a complaint with the Interstate Commerce Commission alleging that the Asbury Park and Monmouth operations of Bingler were unauthorized and were therefore in violation of Section 206(a) of the Interstate Commerce Act, 49 USCA § 306(a), requiring authorization by certificate for interstate common carriage. I.C.C. No. MC-C-1047. In 1949, Quaker City Bus Company, certified to conduct regular service between New York City and the Garden State track, also filed a complaint charging that Bingler's Garden State service was unauthorized and violative of the Act. I.C.C. No. MC-C-1070. A number of common carriers of passengers and the National Bus Traffic Association intervened in support of the complaints. The cases were consolidated and heard by an examiner of the Commission who recommended that Bingler be ordered to cease and desist from the operations in issue. Division 5 of the Commission then con-

sidered the case and found that Bingler's race track services were unauthorized but that the Asbury Park operations were within the scope of its certificate. After petitions for reconsideration, the entire Commission heard argument and on October 4, 1954 issued its report and order. 62 M.C.C. 731.

In answer to the argument of the complainants that Bingler's earlier operations upon which its certificate was granted under the "grandfather" provisions of Section 206(a) of the Interstate Commerce Act, 49 USCA § 306(a)(3), should be considered in construing the scope of the Bingler certificate, the Commission stated at sheets 15 and 16 of its report: "In view of the conclusion that the meaning of the term 'special operations in round-trip sightseeing or pleasure tours' is established and that there is no ambiguity in defendant's certificate it follows that we are not warranted in going behind defendant's certificate and considering the operations upon which it was granted."

In construing Bingler's grant of authority, the Commission said at sheet 17 of the report: "We conclude that the operations complained of, both those to and from the race tracks and those to and from Asbury Park, might fall within the term 'special operations,' but in view of the other more important restrictive language in defendant's certificate we do not believe this conclusion to be especially significant." After considering the restrictive language of "round-trip sightseeing or pleasure tours" contained in Bingler's certificate, the Commission concluded at sheet 24 that "round-trip sightseeing or pleasure tours, in special operations, which involve radial or territorial grants of authority, must include something substantial in addition to, or different from, bare expeditious transportation between two points which factor is the fundamental characteristic of ordinary regular-route passenger-carrier service."

The Commission then held Bingler's race track and Asbury Park operations to be no more than "bare expeditious

transportation between two points." An order was entered "That defendant Bingler Vacation Tours, Inc., be, and it is hereby notified and required, on or before November 22, 1954, to cease and desist, and unless and until appropriate authority therefor it obtained, thereafter to refrain and abstain, from the performance of any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it."

A subsequent petition of Bingler for reconsideration or, in the alternative, for further hearing incident to a general investigation was denied by the Commission. The effective date of the cease and desist order was subsequently postponed by the Commission until June 10, 1955. In the meantime, Bingler filed its complaint in this case under 28 USC § 2321 *et seq.* seeking an order setting aside the action of the Commission. A three-judge district court was constituted according to 28 USC § 2284. A number of petitions to intervene in support of the Commission's order were filed by those who had been parties before the Commission and were allowed in accordance with 28 USC § 2323. A hearing was conducted on May 27, 1955, and prior to the effective date of the Commission's cease and desist order, an order of this court dismissing the complaint was filed along with a per curiam opinion and the findings of fact and conclusions of law.

Section 207 of the Interstate Commerce Act, 49 USCA § 307, anticipates, as the Commission pointed out at sheets 13 and 14 of its report, that certificates might be granted for three distinct types of motor carrier service: for operations over "regular route or routes, and between fixed termini," for "charter" operations, and for "special" operations. Although these admittedly are broad categories, they are meaningful and the certificate issued to Bingler clearly falls with in the category of "special" operations. The problem in this case is to determine just what types of special operations Bingler was authorized to carry on

by its certificate. Since we agree with the Commission that Bingler's certificate is not ambiguous, that can be done properly only by construing the language of the certificate itself.

Bingler's certificate authorizes it to carry over "Irregular Routes: Passengers and their baggage, in special operation restricted to traffic originating at the points indicated in round-trip sightseeing or pleasure tours, From [certain] points and places . . . to points and places in [a number of states] . . . and return." We think that such words ordinarily require a carrier to conduct more than "bare expeditious transportation between two points" —to employ the Commission's own phrase. We must concede, however, that "bare expeditious transportation between two points" in some instances may be deemed to constitute a pleasure tour. For example, where a motor carrier transports passengers from a populated area to a shrine or recreation area, the service afforded might reasonably be thought of as a pleasure tour. The Commission has so regarded such service by granting pleasure tour certificates to carriers offering this type of transportation. See *e.g.*, Smoky Mountain Tours Co., Common Carrier Application, 10 M.C.C. 127 (1938); Bowen Motor Coaches Common Carrier Application, 22 M.C.C. 691 (1940); and Taylor Common Carrier Application, 27 M.C.C. 550 (1941).

In the cases cited, however, each carrier was specifically authorized to operate its pleasure tour between fixed termini, so that bare expeditious transportation was contemplated as a characteristic of the service. But Bingler's certificate was not a grant of authority to operate between fixed points but an authorization to conduct over irregular routes "round-trip sightseeing or pleasure tours, from points and places in" three New Jersey Counties and New York City "to points and places in" a number of states. The Commission has described this as a radial

or territorial grant of authority and we agree with the Commission that bare expeditious transportation was not contemplated and is not permissible under it.

As the Commission has pointed out, such a ruling does not mean that a carrier holding a radial or territorial tour certificate may not under certain circumstances operate primarily between two points. But when such service is undertaken, it must involve something more than bare expeditious transportation. The Commission explained this clearly at sheet 24 of its report, saying: "When, however, a carrier holding tour authority on a *radial or territorial basis* undertakes to set up a tour of one day or less between two specific points it then becomes important that something extra and something substantial be added to the bare transportation involved. If regularity, frequency, and expeditious service are introduced as additional factors in such point-to-point operation, then progressively it becomes even more important that these characteristics of an ordinary passenger operation not predominate in the service which is offered and provided to its patrons."

The nature of this distinction is illustrated by the decision of Division 5 of the Commission in Red Star Sightseeing Line, Inc., Common Carrier Application, 1 M.C.C. 521, 522 (1937), discussed at length in Bingler's brief. Red Star, which operated all-expense trips of several days duration through various states, also conducted one-day trips to Asbury Park and to Lake Hopatcong, New Jersey. On the basis of all of these operations Red Star was granted a territorial tour certificate. But the opinion in the Red Star case reveals that "something extra and some thing substantial" was added to bare transportation to Asbury Park and Lake Hopatcong. The Commission states: "Tickets are sold individually in advance for reserved seats for specific round-trip tours, with no pick-up or discharge of passengers en route. Stops are made at

various point of interest, with the driver acting as a guide in instances where no guides are on duty." Thus, where something more than bare expeditious transportation characterizes the service, point-to-point operations may be conducted under a territorial tour certificate. See, *e.g.*, Blue & Grey Sight Seeing Tours, Inc., Common Carrier Application, 8 M.C.C. 124 (1938), and Resler v. Hunter Clarkson, Inc., 41 M.C.C. 665 (1943).

Since Bingler must rely upon the language of its certificate in making its plans and investments, it is important that the language be clear and definite. As we have said, we think that the Bingler certificate is clear and that the Commission's interpretation of the certificate is the proper and reasonable one. The action of the Commission in prior cases indicates the pattern followed by the Commission in this case in distinguishing between point-to-point tour certificates and territorial tour certificates and between allowable and prohibited point-to-point service under a territorial certificate. Moreover, by classifying special operational certificates along these lines, the Commission is acting within its powers in furtherance of a legitimate purpose. In certain situations, certification for expeditious point-to-point tour service may be warranted either because there is no ordinary regular-route service or because there is a need to supplement the regular service. In other situations, where there is adequate expeditious point-to-point service, it may be necessary to allow only territorial tour operations. "Otherwise," as the Commission has said at sheet 25 of its report in the instant case, "a carrier holding such authority, without any fixed responsibility to the public, could concentrate at will on practically any points of its choosing within its authorized territory in direct and destructive competition with the ordinary regular-route carrier upon which the public must depend for its day-to-day basic transportation, in violation of the purport of its certifi-

cate and contrary to the public interest and the national transportation policy."

It is our conclusion that Bingler's territorial tour certificate did not authorize it to conduct the bare expeditious service which it operated between New York City, on the one hand, and Monmouth, Garden State, and Asbury Park, on the other. Although the most direct route was not used by Bingler on the out-bound trip to Asbury Park, we do not think this was sufficiently significant to change the expeditious nature of that service. The order of the Commission prohibiting these operations must therefore be sustained.

Bingler argues that by prohibiting it from performing "any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it," the Commission has gone beyond the scope of this case and placed Bingler in the dilemma of assessing the legality of its other carrier operations at the risk of contempt proceedings. But the hardship on Bingler seems slight for the Commission explained the criteria of proper territorial tour service clearly and adequately in its report. Moreover, the repetition of similar prohibited conduct in like situations may be anticipated and enjoined along with the particular operations in issue in this case. See Brady Transfer & Storage Co. v. United States, 80 F. Supp. 110, 118 (S.D. Iowa 1948), aff'd 335 U.S. 875 (1948). Cf. Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board, 213 F. 2d 814, 818 (9 Cir. 1954), and Schauffler v. United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry, 218 F. 2d 476, 480 (3 Cir. 1955).

Bingler also complains of the denial of its petition to the Commission to reopen the case or to institute a general investigation but these were matters which rested within the discretion of the Commission. See Interstate

Commerce Commission v. Jersey City, 322 U.S. 503, 514-519 (1944) and United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535 (1946). We cannot say that the Commission abused its discretion in denying the relief sought.

Findings of fact were filed by this court on June 9, 1955, as were conclusions of law. What we have said in this opinion supplements those findings and conclusions. Bingler's complaint was dismissed by an appropriate order on June 9, 1955.

Motion to Affirm

NOV 2 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 444

BINGLER VACATION TOURS, INC.,
Appellant

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees,

And

ASBURY PARK-NEW YORK TRANSIT CORP., QUAKER CITY BUS COMPANY, HUDSON TRANSIT LINES, INC. AND NATIONAL BUS TRAFFIC ASSOCIATION, INC.,
Intervenor-Appellees

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